

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

CASE TRACK THREE

November 10, 2021
9:00 A.M.

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VOLUME 27

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TRANSCRIPT OF JURY TRIAL PROCEEDINGS,
BEFORE THE HONORABLE DAN A. POLSTER,
UNITED STATES DISTRICT JUDGE,
AND A JURY.

- - - - -

Official Court Reporter: Heather K. Newman, RMR, CRR
7-189 U.S. Court House
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Cleveland, Ohio 44113
216-357-7035

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09:29:00 1 Wednesday Session, November 10, 2021, at 9:00 A.M.

09:29:00 2 COURTROOM DEPUTY: All rise.

09:29:06 3 THE COURT: All right. Everyone can be
09:29:07 4 seated, please. All right.

09:29:27 5 Good morning. We have a number of matters. Let's
09:29:36 6 start with what was on the schedule, which was any remaining
09:29:39 7 issue with the trial exhibits.

09:29:41 8 MS. FITZPATRICK: Yes, Your Honor. Good
09:29:43 9 morning. Laura Fitzpatrick for the plaintiffs.

09:29:46 10 I'm pleased to tell you that we worked long into the
09:29:48 11 night last night with all sides, and we have come to an
09:29:50 12 agreement that there are no issues to bring to you,
09:29:53 13 Your Honor, for resolution with respect to the admitted
09:29:56 14 exhibits, with one caveat. And I believe that Mr. Delinsky
09:30:00 15 may want to put on the record just as an objection -- let me
09:30:04 16 restate that. I apologize.

09:30:05 17 We have no issues with Walmart -- Walgreens as to
09:30:11 18 admitted exhibits.

09:30:12 19 With respect to CVS, we are in agreement that we do
09:30:16 20 not need your guidance or ruling on anything.

09:30:19 21 We're in agreement as to the form of how the *Holiday*
09:30:22 22 case will go back to the jury. I believe Mr. Delinsky would
09:30:26 23 like to note for the record his objection to that document
09:30:29 24 going into evidence, but we're not here to argue --

09:30:33 25 THE COURT: Okay.

09:30:34 1 MS. FITZPATRICK: -- about the document.

09:30:36 2 MR. DELINSKY: And, Your Honor, it's just --
09:30:38 3 as I'm sure Your Honor remembers, the case and the decision
09:30:41 4 came in over our objection to begin with.

09:30:44 5 THE COURT: Right.

09:30:44 6 MR. DELINSKY: So Ms. Fitzpatrick did
09:30:50 7 characterize it right. I did just want to put on the record
09:30:53 8 our objections to the *Holiday* case being in evidence under
09:30:56 9 401, 402, 403, 404, 408, 603, and 803.

09:31:03 10 So we still continue to object but we have nothing
09:31:06 11 beyond those objections to raise with you now, mindful that
09:31:09 12 Your Honor has already let it in.

09:31:10 13 THE COURT: All right.

09:31:11 14 MR. DELINSKY: And --

09:31:12 15 THE COURT: When we break today, I want to
09:31:13 16 make -- I want counsel to stay with Mr. Pitts and make sure
09:31:20 17 that he's on a -- what is it, on a jump drive?

09:31:25 18 COURTROOM DEPUTY: It's a flash drive.

09:31:27 19 They're going to work that out over the weekend and
09:31:30 20 give you a drive over the -- on Monday because they have to
09:31:33 21 check each other's work.

09:31:34 22 THE COURT: All right.

09:31:34 23 So you're going to do that and give it to us on
09:31:37 24 Monday?

09:31:37 25 MS. FITZPATRICK: Yes, Your Honor. Each side

09:31:39 1 has shared a link to the document, the specific electronic
09:31:43 2 file that will be placed onto the flash drive. And although
09:31:48 3 we're in agreement as to where redactions need to go, I
09:31:50 4 think both sides would just feel comfortable if we had a
09:31:54 5 fresh pair of eyes on the documents to ensure that what
09:31:56 6 the -- you know, that the documents reflect the agreements
09:31:58 7 that have been made.

09:31:59 8 But I do not envision any issues coming before
09:32:02 9 Your Honor.

09:32:03 10 THE COURT: All right.

09:32:03 11 Well, because there won't be any time for any so I'll
09:32:07 12 just assume everyone's going to look at it and will have
09:32:10 13 signed off that the flash drive has everything that it
09:32:14 14 should have, that it doesn't contain any documents it
09:32:17 15 shouldn't have, and that that any redactions were made to
09:32:21 16 everyone's satisfaction.

09:32:22 17 MS. FITZPATRICK: Yes, Your Honor.

09:32:23 18 And if I may, Your Honor, just for the record, and I
09:32:26 19 think for the benefit of opposing counsel.

09:32:29 20 To the extent that there have been redactions to
09:32:33 21 documents that may have previously been posted on the
09:32:36 22 Court's website, plaintiffs have agreed that those versions
09:32:40 23 will be replaced with the redacted versions.

09:32:43 24 We will make it seamless and easy for Mr. Pitts and
09:32:48 25 the Court staff to have that done, but I did want to

09:32:51 1 represent on the record that we have no problem with that.

09:32:52 2 Also, for the benefit of the record, I think it may be
09:32:55 3 helpful for me, if Your Honor will permit, to just read in
09:33:01 4 the plaintiff exhibit numbers for the *Holiday* decision.

09:33:04 5 THE COURT: Okay.

09:33:05 6 MS. FITZPATRICK: If -- thank you, Your Honor.

09:33:06 7 The first is P-42147A. The second version is P-8166.
09:33:18 8 And the third time that the *Holiday* case appears within an
09:33:22 9 admitted exhibit is P-7799, and the agreed-to redactions
09:33:27 10 will appear in all versions of those exhibits.

09:33:32 11 MR. DELINSKY: And, Your Honor --

09:33:33 12 THE COURT: We're going to have three exhibits
09:33:35 13 of *Holiday*?

09:33:36 14 MS. FITZPATRICK: Well, Your Honor, it's --
09:33:38 15 the issue is that the -- there was a version of the *Holiday*
09:33:41 16 decision that was used by Mr. Lanier live in court, and then
09:33:44 17 there were two deposition exhibits for depositions that were
09:33:48 18 played in court where the -- in one instance, P-7799, there
09:33:56 19 was an e-mail to Mr. Brad Nelson that attached the decision,
09:34:00 20 and our interest in that document was the cover e-mail and
09:34:04 21 the fact that Mr. Nelson was on notice of the *Holiday*
09:34:08 22 decision.

09:34:09 23 THE COURT: All right.

09:34:10 24 Well, we just want to make sure that the same
09:34:13 25 redactions are made on all versions.

09:34:18 1 MS. FITZPATRICK: That's exactly right,
09:34:20 2 Your Honor are. And that's all I wanted to make sure was
09:34:23 3 clear for the record.

09:34:24 4 MR. DELINSKY: And, Your Honor, there's one
09:34:25 5 other nuisance associated with the *Holiday* case that I'll
09:34:28 6 just bring to Your Honor's attention.

09:34:30 7 The parties have agreed to a cover stipulation that
09:34:34 8 simply defines the word "respondents" as it appears in the
09:34:37 9 opinion because that could otherwise be confusing to lay
09:34:40 10 persons.

09:34:41 11 THE COURT: Where is that going to appear?

09:34:43 12 MR. DELINSKY: I think it's going to be
09:34:44 13 stapled to the cover of the exhibit, Your Honor.

09:34:48 14 THE COURT: All right.

09:34:50 15 MS. FITZPATRICK: That's correct, Eric.

09:34:51 16 And, Your Honor, I do have a copy of the redacted
09:34:53 17 version if Your Honor would like to see where we ended up.

09:34:55 18 THE COURT: All right.

09:34:58 19 MR. DELINSKY: And again, Your Honor, not --
09:35:00 20 just out of an abundance of caution, just over CVS's -- the
09:35:05 21 objections previously stated.

09:35:30 22 (Brief pause in proceedings.)

09:35:36 23 THE COURT: Okay.

09:35:39 24 This looks like one of those classified documents
09:35:43 25 which -- very little public and almost everything blacked

09:35:46 1 out but --

09:35:48 2 MS. FITZPATRICK: Your Honor, I agree.

09:35:49 3 Plaintiffs were very generous with those redactions.

09:35:54 4 (Laughter.)

09:35:54 5 THE COURT: Very little of Mr. Delinsky's

09:35:56 6 objection because there's not much of this in.

09:35:59 7 Okay. All right. Thank you.

09:36:01 8 MR. DELINSKY: And, your Honor, I think one

09:36:02 9 other exhibit issue, and I don't think it's an issue but

09:36:06 10 given how we have worked out -- given what's now coming in,

09:36:12 11 we move in CVS-MDL-04954, which was the Temporary

09:36:18 12 Restraining Order issued in I think what we've also loosely

09:36:21 13 called the *Hansen* case. That's where CVS was ordered by the

09:36:25 14 District Court in Kentucky to continue filling prescriptions

09:36:27 15 and not to suspended Dr. Hansen, and I don't want to put

09:36:32 16 words in your mouth, Laura, but I believe that --

09:36:35 17 MS. FITZPATRICK: Your Honor, this is kind of

09:36:37 18 a goose/gander issue.

09:36:38 19 It is part of the agreement related to *Holiday*.

09:36:43 20 However, plaintiffs would, in other circumstances, have

09:36:47 21 objected to the admissibility of that document but it is --

09:36:50 22 Mr. Delinsky is correct that this was kind of a package

09:36:53 23 deal.

09:36:53 24 THE COURT: All right. Fine.

09:36:54 25 MR. DELINSKY: And, Your Honor, I just want

09:36:56 1 to -- again, I'm doubling on my neuroticism here,
09:37:00 2 Your Honor, but we're -- the agreement was as to the form of
09:37:05 3 the admission, but we maintain our objections to the *Holiday*
09:37:07 4 case for the reasons stated.

09:37:08 5 THE COURT: All right. Fine.

09:37:09 6 Okay. All right. Well, I appreciate everyone's hard
09:37:14 7 work in working through any issues with the exhibits.

09:37:17 8 So, again, just make sure that that flash drive is
09:37:22 9 accurate and then the jury will be able to access -- I'm
09:37:26 10 curious. Is there some sort of an index or how were they
09:37:31 11 going to. . . I mean, is there going to be an index with
09:37:34 12 those? Are they going to be listed numerically?

09:37:38 13 How are they going to be able to go through them?

09:37:40 14 COURTROOM DEPUTY: Well, Judge, there -- the
09:37:42 15 exhibits are numbered, of course, with the number exhibits
09:37:44 16 but it also has a brief description. There's supposed to be
09:37:48 17 a brief description of the exhibits so the jury will know
09:37:51 18 what they're accessing.

09:37:52 19 THE COURT: All right. So there is that?

09:37:54 20 COURTROOM DEPUTY: Yeah.

09:37:54 21 THE COURT: Okay. That's good.

09:37:56 22 COURTROOM DEPUTY: The name of the file will
09:37:57 23 tell what it is.

09:37:57 24 THE COURT: Okay. Fine. That will help the
09:38:01 25 jury.

09:38:02 1 Okay. All right. I think CVS proposed a couple
09:38:17 2 amendments to the jury instructions. I've looked at them
09:38:27 3 and I'm not inclined to make those changes.

09:38:33 4 MR. DELINSKY: Your Honor, I think we put in
09:38:37 5 ones yesterday and I think there was agreement with
09:38:40 6 plaintiffs that the ones put in yesterday that added in two
09:38:45 7 places, that is ongoing today --

09:38:48 8 THE COURT: Well, I thought I changed -- I
09:38:50 9 made those changes.

09:38:51 10 MR. DELINSKY: Oh, okay. All right. We just
09:38:52 11 haven't seen that, Your Honor. Okay.

09:38:53 12 THE COURT: Well, wait. I thought those were
09:38:55 13 sent to everyone. Julian, weren't those sent to everyone?
09:39:00 14 Weren't those sent yesterday?

09:39:03 15 LAW CLERK: No, Your Honor.

09:39:03 16 THE COURT: All right. Those were supposed to
09:39:05 17 go out last night.

09:39:06 18 MR. DELINSKY: Thank you, Your Honor.

09:39:06 19 THE COURT: Let's get that done right now so
09:39:08 20 everyone can see them.

09:39:10 21 Give everyone hard copies who's here, please.

09:39:13 22 I apologize. That was supposed to happen last night.

09:39:22 23 Well, the proposal is to add, "You should not think
09:39:24 24 that something is true just because an attorney's questions
09:39:28 25 suggest that it is true."

09:39:28 1 I've already instructed them that attorneys' questions
09:39:31 2 aren't evidence, so I don't need that.

09:39:35 3 And then there's some other changes to public nuisance
09:39:40 4 based on a decision yesterday in the *Johnson & Johnson* case
09:39:46 5 by the Supreme Court of Oklahoma.

09:39:50 6 Well, that decision involved Oklahoma public nuisance
09:39:54 7 law. This is Ohio. So I'm certainly not changing anything
09:39:57 8 as a result of that opinion.

09:39:58 9 MR. DELINSKY: Your Honor, the one thing I
09:39:59 10 would add to the one sentence that we've proposed there is
09:40:05 11 that comes from the restatement second. But I -- and that
09:40:09 12 was part of what prompted us to include it.

09:40:13 13 THE COURT: Well, I'm not making that change.

09:40:15 14 MR. DELINSKY: Okay. Understood, Your Honor.

09:40:25 15 MS. TABACCHI: Your Honor, if I may. It's
09:40:27 16 Tina Tabacchi on behalf of Walmart.

09:40:29 17 If we could revisit the CVS motion to preclude certain
09:40:33 18 argument. Walmart would join in that motion and it's beyond
09:40:36 19 the instruction to disregard lawyer questions. What we are
09:40:40 20 looking for is to not have those questions used in closing.

09:40:44 21 THE COURT: Well, I'm addressing that now.

09:40:46 22 MS. TABACCHI: Oh, okay. Thank you.

09:40:47 23 THE COURT: CVS moved to preclude certain
09:40:52 24 argument. All right.

09:40:52 25 Everyone knows that a lawyer's question isn't evidence

09:40:56 1 and that a lawyer's question, followed by an answer, "I
09:41:01 2 don't know, I don't recall," does not admit into evidence
09:41:07 3 the subject matter of the question or anything contained in
09:41:10 4 the question.

09:41:10 5 I'm not going to have any references to questions with
09:41:15 6 answers like that, but -- I mean, the only way that the
09:41:24 7 document's referenced in a question like that is if they're
09:41:28 8 already in, if the documents are already in, or if there was
09:41:33 9 a prior question containing those documents or compilation
09:41:40 10 or statistics to a witness and the witness acknowledged it
09:41:42 11 and talked about it, well, then, you've got an actual answer
09:41:47 12 with content, so.

09:41:51 13 So there's no way I'm going to be able to -- you know,
09:41:57 14 I don't have at my fingertips all this evidence and the
09:42:00 15 statistics, and I don't want opening -- closing arguments to
09:42:04 16 be interrupted every five minutes.

09:42:07 17 So what are you all proposing? How are you proposing
09:42:10 18 we handle this?

09:42:14 19 MR. LANIER: Your Honor, Mark Lanier by phone.
09:42:16 20 If I can be heard for a moment.

09:42:18 21 First of all, I think we've got great experienced
09:42:23 22 lawyers. I think the rules are real clear on this. Lawyer
09:42:26 23 questions are not evidence and you're not allowed to bury
09:42:30 24 within the question something that's not in evidence.

09:42:34 25 Certainly not anything that I would do in closing,

09:42:40 1 reference non-evidence in closing. And those questions were
09:42:43 2 asked by all parties.

09:42:45 3 I have the same concern with the disk that's been
09:42:49 4 subject to the Motion in Limine that was filed, except I
09:42:53 5 didn't file one because I just figured the lawyers are going
09:42:56 6 to follow the rules. And I think it's incumbent on all of
09:43:00 7 us, as officers of the Court, to not make arguments that are
09:43:04 8 blatantly objectionable, and I think these would be.

09:43:06 9 If there is a question that references evidence that
09:43:11 10 is actually in front of the jury, that evidence has been
09:43:14 11 admitted, then that's a different kind of question. But I
09:43:21 12 asked, for example, a number of questions about, "Did you
09:43:24 13 know that the dispensing records contained your dispensing
09:43:30 14 'X' number of prescriptions to Dr. Demangone or Demangone or
09:43:35 15 however he says his name," and the witness would say no.

09:43:38 16 I have those statistics in front of me. I had a good
09:43:40 17 faith basis, but I didn't have them in evidence and so I
09:43:43 18 can't play that in front of the jury in closing. I can't
09:43:46 19 reference that in that way and would not do so.

09:43:51 20 Likewise, that was done by Mr. Stoffelmayr and that
09:43:55 21 was done by Mr. Delinsky and that was done by Ms. Fumerton
09:44:00 22 at different times, and I believe they're not going to
09:44:04 23 either.

09:44:04 24 All to say -- and I'll shut up -- we're going to all
09:44:07 25 follow the rules, I hope. And if we don't, then shame,

09:44:11 1 shame on us and there would be an objection, but I just
09:44:14 2 don't see anybody not following the rules on this. This, to
09:44:17 3 me, is like don't stand up and make racial comments. I
09:44:21 4 mean, this is a given, you know.

09:44:26 5 MR. DELINSKY: I think we're in agreement,
09:44:27 6 Your Honor.

09:44:27 7 THE COURT: All right.

09:44:28 8 MR. DELINSKY: That no one's going to
09:44:29 9 reference those kinds of -- the questions that are embedded
09:44:32 10 with facts not in evidence.

09:44:33 11 THE COURT: All right.

09:44:33 12 Well, I'm going to rely on counsel because you have,
09:44:39 13 you know, at your fingerprints, you know, real time
09:44:44 14 transcript, all the exhibits, the documents, the statistics.
09:44:48 15 I don't. So I'm going to rely on the fact I do have the
09:44:52 16 best lawyers in the country and I know you can follow the
09:44:54 17 rules.

09:44:54 18 So if something is in evidence, you can refer to it,
09:45:00 19 but if it's not, you can't. And you certainly can't, you
09:45:05 20 know, reference a question where you're putting something in
09:45:08 21 that's not in evidence and the only answer is, "I don't
09:45:10 22 know, I don't recall, I never saw it," because that -- I
09:45:15 23 will really clamp down hard on anyone who does that.

09:45:17 24 All right. Well, anything else that anyone can think
09:45:28 25 of that we ought to cover?

09:45:35 1 MS. FITZPATRICK: Not for plaintiffs,
09:45:36 2 Your Honor. I don't believe so.

09:45:39 3 THE COURT: Anything from any of the
09:45:41 4 defendants?

09:45:42 5 MR. DELINSKY: I don't think so, Your Honor.
09:45:43 6 I'm looking around at other -- my colleagues. I don't
09:45:48 7 believe so.

09:45:48 8 MR. SWANSON: Nothing from us, Your Honor.

09:45:49 9 THE COURT: Okay. Well, have a good few days,
09:45:54 10 and I'm looking forward to the closing arguments.

09:45:56 11 So we're going to -- my plan is to do the plaintiffs'
09:46:05 12 closing and most of the instructions before lunch. We'll
09:46:08 13 break -- take an hour for lunch. We'll come back. We'll do
09:46:14 14 two of the defendants. You can -- it doesn't matter which
09:46:17 15 two. We'll take our mid-afternoon break. We'll have the
09:46:22 16 last one and the close of the instructions, and then the
09:46:24 17 jury will retire.

09:46:25 18 And my guess is they'll want to adjourn pretty
09:46:30 19 quickly, but if they don't, I mean, it's up to them. They
09:46:33 20 can -- they set their own schedule.

09:46:35 21 And I provide lunch, starting Tuesday for
09:46:39 22 deliberations. I'm not allowed to do it during the trial,
09:46:43 23 but the rules permit it for deliberations. So I'm going to
09:46:48 24 be doing that. I found it saves time, obviously minimizes
09:46:55 25 distractions, the opportunity to talk to anyone else. It

09:46:58 1 builds collegiality. So I do that. And so I'll be
09:47:04 2 providing lunch for them.

09:47:06 3 Okay.

09:47:07 4 MR. DELINSKY: Your Honor, before -- just on
09:47:08 5 that scheduling, just one point.

09:47:12 6 I don't want there to be a surprise on Monday
09:47:15 7 afternoon. We have not made decisions internally how we're
09:47:20 8 going to allocate time, if there will be common portions or
09:47:24 9 everyone will go by their hours.

09:47:25 10 THE COURT: That's true. You don't have to
09:47:27 11 have exactly one hour, one hour, one hour.

09:47:29 12 MR. DELINSKY: Yeah, and it could interfere --

09:47:31 13 THE COURT: I'll still probably --

09:47:34 14 MR. DELINSKY: Yes, exactly. Your Honor.

09:47:35 15 THE COURT: Well, I'd rather not have to cut
09:47:38 16 someone off in the middle, but if someone is going to take
09:47:41 17 one hour and 45 minutes -- well, I'll tell you what, why
09:47:46 18 don't -- you're going to figure this out over the weekend.
09:47:49 19 Why don't you let me know Monday and so I'll know sort of
09:47:53 20 what you're planning to do.

09:47:55 21 MR. DELINSKY: We'll do that, Your Honor.
09:47:57 22 Yeah. Then we can figure out where the break should go.

09:48:00 23 THE COURT: Right. I'd rather not have to cut
09:48:05 24 one of you off in the middle, but if you allocate your time
09:48:09 25 in such a way that there's no other way to do it, you know,

09:48:12 1 it's not so terrible.

09:48:14 2 Mr. Lanier is going to have to do that with his.

09:48:16 3 MR. DELINSKY: Right. Wouldn't be the end of
09:48:17 4 the world.

09:48:18 5 MR. LANIER: Your Honor, my -- Your Honor,
09:48:19 6 Mark Lanier.

09:48:21 7 My plan -- if I understand the Court right, my plan is
09:48:24 8 you will do your initial charge to the jury starting around
09:48:27 9 9:00.

09:48:28 10 THE COURT: Right.

09:48:28 11 MR. LANIER: That means I will get to start
09:48:32 12 probably around 9:30.

09:48:34 13 I'm planning an initial segment that will last
09:48:39 14 one hour, to about 10:30. We take the break. Then I've got
09:48:42 15 the next section for an hour and a half and then we take the
09:48:44 16 breaks, et cetera, and then I'll save that 30 minutes for
09:48:47 17 rebuttal if that's okay.

09:48:49 18 THE COURT: That's it.

09:48:50 19 So I think if we do it that way, my guess is we'll
09:48:53 20 take our lunch break, it will be around 12:15, somewhere
09:48:57 21 around there is what I'm figuring.

09:49:01 22 Okay. Okay. All right. Have a good few days, and
09:49:06 23 see everyone on Monday.

09:49:08 24 MS. FITZPATRICK: Thank you, Your Honor.

09:49:08 25 MR. DELINSKY: Thank you, Your Honor.

09:49:10 1

(Proceedings adjourned at 9:49 a.m.)

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C E R T I F I C A T E

4

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter
prepared from my stenotype notes.

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6

/s/ Heather K. Newman11-10-2021

HEATHER K. NEWMAN, RMR, CRR

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